UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 07-11270-JJ

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

JOHN THOMAS BOLEN
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANT

THE LAW OFFICE OF
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NO. 07-11270-JJ

UNITED STATES v. JOHN THOMAS BOLEN

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

1. Magistrate Judge Frank J. Lynch, Jr.

2. United States District Court Judge K. Michael Moore.

3. A. Michael Bross, Co-Trial Counsel for Defendant-Appellant Bolen.

4. John Thomas Bolen, Defendant-Appellant.

5. A. Brian Phillips, Co-Trial Counsel for Defendant-Appellant Bolen.

6. William Mallory Kent, Appellate Counsel for Defendant-Appellant Bolen.

7. Rinku Talwar, Assistant United States Attorney, Trial Counsel for the Government.

STATEMENT REGARDING ORAL ARGUMENT

John Thomas Bolen requests oral argument.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

This Court has jurisdiction over the merits issues in this case under 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court. This Court has jurisdiction over the sentencing issues under the authority of 28 U.S.C. § 3742. The notice of appeal was filed in a timely manner within ten days of rendition of judgment and sentence.

STATEMENT OF THE ISSUES

I. COURT ERRED IN OVERRULING BOLEN'S OBJECTION TO IMPROPER GOVERNMENTAL VOUCHING FOR KEY WITNESS.

II. COURT ERRED IN DENYING BOLEN'S REQUESTED DOWNWARD DEPARTURE JURY INSTRUCTION.

III. COURT ERRED IN DENYING BOLEN'S REQUESTED THEORY OF DEFENSE JURY INSTRUCTION.

IV. COURT ERRED IN DENYING (WITHOUT AN EVIDENTIARY HEARING) BOLEN'S SUPPLEMENTAL MOTION FOR NEW TRIAL BASED ON GOVERNMENT'S FAILURE TO PRODUCE CRIMINAL RECORD OF GOVERNMENT WITNESS.

V. COURT ERRED IN SENTENCING BOLEN WITHOUT ADEQUATELY ADDRESSING THE SECTION 3553 FACTORS AND WITHOUT ADEQUATELY PROVIDING A STATEMENT OF REASONS FOR THE IMPOSITION OF A LIFE SENTENCE ON A FIRST OFFENDER.

VI. COURT'S APPLICATION OF THE SENTENCING GUIDELINES RESULTED IN A *DE FACTO* VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

STATEMENT OF THE CASE

STATEMENT OF FACTS

OVERVIEW OF THE CASE[1]

July 28, 2006 a United States Coast Guard vessel encountered a 42' sportfishing boat named "Gypsy" between the Bahamas and the Florida coast. The Coast Guard boarded the Gypsy and found it captained by Tristan Michael Seymore ("Seymore"). Quincy Nathaniel Garvey ("Garvey") was the only other person on board. Seymore and Garvey identified John Thomas Bolen ("Bolen") as the owner and said they had been hired by Bolen to transfer the vessel from the Bahamas to Florida for repairs. Coast Guard contacted Bolen by phone and confirmed these statements. Garvey lacked the proper travel documents so the Coast Guard escorted the Gypsy to the Cracker Boy Boat Works in Ft. Pierce, Florida and contacted Immigration and Customs Enforcement ("ICE") and requested they be met at the dock.

While ICE agents interviewed Garvey and Seymore at the dock in Ft. Pierce, a St. Lucie County Sheriff's Officer walked a dog around and through the Gypsy. The dog alerted to several suitcases. They were opened and 164 bricks of cocaine weighing 188 kilograms were found. A subsequent search of the vessel yielded four

[1] The following Overview is derived from paragraphs 4-14, inclusive, of Bolen's PSR.

cell phones, a GPS and a satellite phone. Garvey and Seymore were arrested and DEA was called into the case.

After being advised of his *Miranda* rights, Garvey gave a statement which he later contradicted, that he did not know and had never met Bolen. Instead Garvey said that he had been hired by Seymore two days earlier to accompany him on the Gypsy to the United States for repairs. He claimed to have never gone in any of the cabins (where the suitcases with the cocaine were found).

Seymore was then given his *Miranda* rights and interviewed. Seymore contradicted Garvey. Seymore said that he had been introduced to Garvey through Bolen who had told Seymore that he had "something" that he needed taking to the United States aboard the Gypsy. Seymore did not know what that was but he figured it was something illegal. The day before the arrest Seymore said Bolen contacted him and told him the shipment was ready, and to fuel the boat. Seymore was to be paid $800 for the trip. Seymore said that on the way over they were intercepted by Coast Guard. If they had made it, they were to be called on the satellite phone by Bolen as they entered the St. Lucie inlet. Bolen was to be in another boat and lead them to a dock.

The agents then reinterviewed Garvey, but he did not change his statement.

The agents then put the two men in the same room together and had Seymore

tell his version of the events to Garvey. Garvey became irate and said Seymore was lying.

Garvey then agreed to give a third statement. This time Garvey said that he knew that there was cocaine on the boat but he did not know how much. Garvey said the cocaine did not belong to Bolen, Bolen was merely allowing his boat to be used to transport it. The recipients of the cocaine were to be two Bahamian cocaine traffickers in Miami.

Garvey said he had only met Seymore once, through Bolen. Seymore had asked him to accompany him because he was afraid to go alone. The plan was for Seymore and Garvey to take the boat to South Florida, Seymore would contact Bolen, and Bolen would provide a location to secure the boat. The owners of the cocaine would then come and take delivery. Garvey was to be paid an unspecified amount by either Seymore or Bolen.

Agents then contacted Bolen and asked him to come to the Coast Guard station to give a statement. Bolen came voluntarily without a lawyer and gave a statement. Bolen told the officers that he owned the Gypsy, that he had had a captain's license and engaged in charter fishing. That he had taken the Gypsy to the Bahamas a month earlier and let it be used on charter. Bolen said he met Seymore a year earlier in the Bahamas and had hired him to clean the hull of a boat, and since then this was the

second time he had hired Seymore totransport the boat for him. Bolen said the prop had been damaged and he was paying Seymore $300 to bring the Gypsy to the Cracker Boy Marina in Florida for repairs. Bolen stated that he did not have anything to do with the drugs found on the boat. At the end of the interview Bolen was read his *Miranda* rights. Bolen stated that he wanted to speak to an attorney and he was allowed to leave.

Seymore was interviewed again three days later in jail. This time Seymore changed his story to admit that he knew he was transporting kilogram quantities of cocaine, and that he was to be paid not $800 but $10,000 to do it. He said Bolen introduced him to Garvey and he saw Garvey help load some of the suitcases of cocaine onto the Gypsy.

That same day, July 31, 2006, Agents interviewed Garvey again. This time Garvey disclosed Bolen's contact for cocaine. Garvey said that this contact ran a cocaine transportation service, finding smugglers willing to transport cocaine for Bahamian drug owners to United States traffickers. That is what happened in this case. Bolen then hired Garvey and Seymore to bring the cocaine to the United States.

A month later, August 31, 2006, Bolen was arrested on a federal complaint and Garvey and Seymore agreed to continue cooperating.

At trial Garvey testified that contrary to his prior statements to law enforcement,

that he and Bolen had engaged in four prior smuggling ventures. Garvey said that two years earlier, in July 2004, he and Bolen had transported sixty kilograms of cocaine in another boat owned by Bolen, named "Teaser." Then in late 2004 he and Bolen transported another 147 kilograms to the United States on the Gypsy. On both these trips Bolen served as his own captain. The third trip was late 2005. In that trip Garvey said he and an unidentified male carried twenty-seven kilograms into the United States on the Gypsy. The fourth prior trip was said by Garvey to have been on July 18, 2006. On that trip Seymore was the captain and Garvey came along with him. They brought forty-seven kilograms into the United States.

Garvey now named a name for the Bahamian drug trafficker Bolen was doing this for: Danny Bullard. According to Garvey Bullard had Bolen carry the cocaine to a person known only as "Shortman."

At trial, Seymore corroborated Garvey's statement that he had done two trips, one July 18, 2006 and the second the day they were arrested, July 28, 2006.[2]

[2] The foregoing Overview came from paragraphs 4-14, inclusive, of Bolen's PSR.

GOVERNMENT TRIAL EVIDENCE

The Government's case against Bolen was built almost exclusively on the testimony of Garvey and Seymore as shown by a description of the witnesses and exhibits presented at trial described below.

The trial started with the testimony of a Coast Guard officer about the interception, [R169-11] followed by a customs agent [R169-23], followed by evidence of the canine search. [R169-41] Coast Guard Officer Burgess was used to introduce Government Exhibit 10, which was Garvey's alleged Bahamian travel document showing that he had no criminal record. [R169-15, GX 10] These officers testified consistent with the overview of the case, *supra*.

Then the Government put Garvey on. [R169-48 through R170-127] Garvey was followed by Seymore.[3] [R170-127-218] Garvey and Seymore testified consistent with

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[3] On redirect of Government witness Seymore, AUSA Talwar engaged in the following exchange:

BY MS. TALWAR:

Q. Mr. Seymour, what is the one thing and the only thing that I have told you?

A. To tell the truth.

Q. What have I said to you about whether this jury convicted this man or whether they acquit this man? What have I told you?

the overview of the case, *supra*.

The Government followed Seymore and Garvey with a custodian of records of Cingular, the cell phone company. [R170-218] The Government introduced records of two cell phones, [GX7, GX8] 772-341-7096 [R170-220] and 321-505-0398. [R170-222] The 321 area code phone started in service March 14, 2006 [R170-222] and the 772 area code phone started in service July 10, 2006. [R170-220] Both phones were in the name of "John Adams," with an address of 2108 Northeast Franklin Street, Palm Bay, Florida. [R170-220-221]

The Government then presented a custodian of records for GMPCS Personal Communications, the satellite phone company. [R170-225] The satellite phone number was 354-377-0865. [R170-227] This account was activated April 2, 2002. [R170-227]

The two record custodians were followed by ICE case agent Phillip Wayne

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MR. BROSS: Objection, Judge, hearsay.

THE COURT: Overruled.

BY MS. TALWAR:

Q. Answer the question.

A. You told me it doesn't matter. Just tell the truth. That's all it is, tell the truth.

[R170-212]

Newhouse. [R170-227] Agent Newhouse testified that there were no records of Gypsy clearing customs between 2004 and July 28, 2006. [R170-248] He also gave an expert opinion that Gypsy was worth $150,000 and that Bolen was its owner. [R170-248] Later on cross-examination Agent Newhouse admitted that Customs had valued the boat at just $65,000 a month after its seizure. [R171-270-271] Agent Newhouse disclosed on cross-examination that he had subpoenaed the records of Cracker Boy Marina, and as Bolen had stated in his interview, Gypsy was scheduled for repairs on August 1, 2006. [R170-258]

Agent Newhouse also disclosed that Garvey had a drug habit, cocaine and marijuana. [R170-261] Agent Newhouse also disclosed on cross-examination that Garvey had admitted engaging in his own separate cocaine deal in Florida after the third alleged trip, but claimed to be unable to identify the people he dealt with. [R171-279]

The Government then presented a former fishing boat captain named George T. Smith, from Atlantic, Florida. [R171-285-286] Captain Smith testified that he was hired by Bolen in the summer of 2005 to take another boat, the Teaser, from the United States to the Bahamas. He was accompanied by a mate named Eric. [R171-289] Bolen was in the Bahamas when he got there. [R171-289] Both the Teaser and the Gypsy were in the Bahamas at that time. The next day Bolen told him he had two

passengers to take back to the United States. There were two black males, with suitcases, already in the boat when he got back on board Teaser. [R171-290-292] Bolen told him to not clear customs. [[R171-292] He was paid $200 per day for this trip. [R171-293]

He was hired again November 9, 2005 to do the same thing, but this time Bolen paid him to fly over to the Bahamas and the boat was already there. [R171-293-294] Again, it was two black males with suitcases and he was told to not clear customs. [R171-295] Again, Captain Smith was paid $400, $200 per day for two days. [R171-297]

Smith was followed by DEA Agent Nicholas Kent.[4] Kent testified that Seymore gave him the 772-341-7096 number for Bolen when he interviewed Seymore on July 31. [R171-337] Kent testified that the subscriber address information for that phone number, 2108 Franklin Drive in Palm Bay was also associated with a business called Bolen Lawn Services in 2000. [R171-338-339] Kent then looked at the Cingular phone records and based on hearsay of what he said Seymore had told him, he matched up calls between the area code 772 phone and what Kent said Seymore said was his Bahamian number for July 10, 11, 13, 14 and July 18, 2006, the date of the alleged fourth cocaine trip. [R171-341-342] On July 18, 2006 there were calls between the two

[4] No relation to Bolen's appellate counsel.

John Adams phones. [R171-342-343] Then in the afternoon of July 18, 2006 there were a series of calls between the newer John Adams phone to the satellite phone, and to and from the other John Adams phone. [R171-344] Finally later that day there were calls from a cellphone in the name of Kirkwood Edwards, by hearsay said to be a cousin of Seymore, calling the newer John Adams cell phone. [R171-345] The next day, July 19, 2006, there were a series of calls between two phones for Kirkwood Edwards and the newer John Adams cell phone. [R171-345] Another series of calls began on July 25 through July 28 between the two John Adams phones.[5] [R171-346-347] Finally, the last call was on July 31, 2006, after the search and seizure, Agent Kent called the newer John Adams phone and just said "My name is Nick Kent. I need you to call me back." Agent Kent was called back by Mr. Bross, one of Bolen's two defense counsel at trial. [R171-348] The Government then rested its case. [R172-408]

DEFENSE EVIDENCE

The Defense called two witnesses, Richard Weibner and the defendant, John Thomas Bolen. [R172-409] Mr. Weibnber was the manager of the Cracker Boy Marina. [R172-410] Bolen called Weibner July 27, 2006 and told him he had damaged the propeller to his boat, Gypsy, and they scheduled an appointment for August 1,

[5] This entire phone record testimony was built on hearsay, but no objections were made.

2006 to have it worked on at Cracker Boy Marina. [R172-412]

Bolen testified in his own defense. [R172-419-R173-585] Bolen established that he had used the Teaser and Gypsy in a well established charter fishing boat business. [R172-419-446] Bolen confirmed that he had used Captain Smith to carry some charter customers back to Florida on the Teaser after their charter was finished. [R172-448] Bolen denied telling Captain Smith to not clear customs but he admitted that he had never in his career cleared customs coming into the United States. [R172-449] Later Bolen testified that he had gone on pleasure trips with his lawyer, whom he had first met ten years earlier, and when they returned from the Bahamas they never cleared customs. [R173-477]

Bolen testified that he was not happy with Captain Smith's performance, that he was an alcoholic and would fail to show for work when he was supposed to take a charter out. [R172-449] After one crossing that resulted in damage to the boat and equipment missing, a total of $14,000 worth, he believed that Captain Smith had had something to do with the theft. [R172-451] Bolen reported this to the police. [R172-451] He let Captain Smith go after that. [R172-451]

Bolen showed that he bought Gypsy for $100,000 including tax and had to finance it to purchase it. [R172-452]

Bolen explained his attorney, Bross, calling Agent Kent back after the telephone

message by saying that he had gotten Agent Kent's number off his phone machine, not that cell phone. [R173-472] Bolen said he hired an attorney at that point not because he was scared, but to get his boat back. [R173-473]

Bolen explained the two Cingular cell phones by telling the jury that if you bring a United States cell phone to the Bahamas and use your Cingular plan, you are charged $2.99 per minute, but you can bring in a new cell phone to the Batelco office in the Bahamas, and they will take it in trade for a Batelco authorized phone at local Batelco rates.[6] [R173-488-489] Bolen had bought prepaid phones because he was in collections with Verizon, and could not get a cell phone in his own name. [R173-539] He told the phone store salesman the truth and that he did not want to put the phone in his own name because of that, and suggested John Q. Customer, but the salesman suggested John Adams. [R173-539] He switched one of these phones out in the Bahamas at Batelco. [R173-541] He did leave a nice flip phone on the Gypsy. [R173-541] Batelco was the carrier on that phone. [R173-541] The second John Adams phone he thought he left on Gypsy. [R173-542]

Bolen testified that he met Seymore at the dock in Freeport the year before. He used Seymore to scrape the hull of his boat. [R173-498] Later Bolen needed a

[6] The transcript reads "Patelco," but this is a stenographer's error. The Bahamas Telephone Company is known as Batelco.

Bahamian captain and was referred to Seymore and met up with him at the Marriott Marina. [R173-503] He agreed to hire him on a handshake. [R173-509] He next met up with him in the Bahamas at the Ocean Reef Club in July 2006. [R173-510-511] Around the 19th or 20th Seymore brought the boat over. [R173-513] They communicated either by VHF radio or Seymore calling his home phone when he came in. [R173-514] When he came in he was not where he was supposed to be and told Bolen that he had come in at the wrong inlet and already dropped his mate off. Now, having heard the trial testimony, Bolen had learned that Seymore apparently had delivered a load of drugs first. [R173-516] Seymore had said the boat had a generator problem, which is why Bolen had him bring it over, but it was resolved, so he had him return it to the Bahamas a couple of days later. [R173-517-518] Bolen did not know Garvey and denied introducing him to Seymore. [R173-547]

Then on the 26th of July Seymore contacted him to tell Bolen he had damaged the prop on Gypsy. [R173-518-519] Bolen made an appointment at Cracker Boy Marina to have it repaired. [R173-519] After all of this Bolen intended to fire Seymore once he got the boat back over. [R173-521] Bolen concluded by denying his guilt. [R173-552-553] At the conclusion of Bolen's testimony, the defense rested. [R173-586] There was no rebuttal case. [R173-586]

COURSE OF THE PROCEEDINGS

Bolen along with Seymore and Garvey was arrested on a federal criminal complaint on or about August 9, 2006. [R1, R2] A four count indictment was returned against Bolen, Seymore and Garvey on August 17, 2006 [R22], charging all three in count one with conspiracy to import five or more kilograms of a mixture or substance containing a detectable amount of cocaine hydrochloride, in violation of 21 U.S.C. 21 U.S.C. § 963 and 21 U.S.C. § 952, in count two with *attempting* to import into the United States five or more kilograms of a mixture or substance containing a detectable amount of cocaine hydrochloride, in violation of 21 U.S.C. § 952 and 18 U.S.C. § 2,[7] in count three with conspiracy to possess with intent to distribute five or more kilograms of a mixture or substance containing a detectable amount of cocaine hydrochloride, in violation of 21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1), and in count four with possession with intent to distribute five or more kilograms of a mixture or substance containing a detectable amount of cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1). Each count alleged a date on or about July 28, 2006. The indictment was superseded September 21, 2006 by expanding the date of each count to a date "as early as June 2004, to on or about July 28, 2006." [R61] The indictment

[7] The indictment alleged an attempt, but did not reference the attempt statute, 21 U.S.C. § 963.

was superseded a second time on November 2, 2006 by addition of a forfeiture count under 21 U.S.C. § 853, seeking, *inter alia*, forfeiture of a forty-two foot fiberglass vessel (boat), and by dropping Garvey from the indictment. [R82] Pursuant to a written plea agreement, Garvey pled guilty to counts one and two of the superseding indictment the same day the second superseding indictment was returned. [R78, R79] Seymore pled guilty pursuant to a written plea agreement two weeks later. [R94, R95]

Bolen filed proposed defense jury instructions before trial. [R102] First, Bolen requested a theory of defense jury instruction. [R102-17] Bolen also requested a jury instruction explaining the availability of a downward departure for the two cooperating alleged coconspirators. [R102-27] The Court denied both defense requested jury instructions. [R173-589; R173-587]

Bolen's trial began with voir dire and opening statement on December 7, 2006. [R108] Evidence began December 8, 2006 and resumed on December 11, 2006. [R169, R171, R172] Closing arguments were on December 12, 2006. [R181] The jury returned guilty verdicts on all four counts December 13, 2006.[8] [R113]

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[8] Immediately after the jury was polled the following exchange took place between the Court and counsel for Bolen:

> THE COURT: And as I understand it, there is an agreement on the forfeiture issue, so there is no further need to proceed on that count?

Bolen requested and was granted 30 days to file post-trial motions. *See* Rule 33(a)(2), Federal Rules of Criminal Procedure. [R174-633]

December 18, 2006 the Government rewarded Garvey for his trial testimony against Bolen by a motion pursuant to U.S.S.G. § 3E1.1(b) for additional acceptance of responsibility and a motion for downward departure under U.S.S.G. § 5K1.1 for substantial assistance. [R117, R118] The Government motions to reward Garvey were granted and he was sentenced January 3, 2007 to 84 months concurrent on counts one and two of the superseding indictment, instead of the ten year minimum mandatory sentence he otherwise faced. [Unnumbered docket entry dated January 4, 2007, R121]

Bolen filed a motion for new trial on January 12, 2007, raising two grounds, (1) denial of a the requested theory of defense jury instruction, and (2) weight (sufficiency) of the evidence. [125] The Government filed a response January 22, 2007 objecting

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MR. BROSS: Yes, your Honor; that is correct.

[R174-632]

The Court did not inquire of Bolen personally if he agreed to waive his right to trial by jury on the forfeiture. On January 3, 2007, apparently in reliance on the statement of Bolen's counsel referred to above, the Government filed a motion for preliminary forfeiture of Bolen's forty-two foot fibreglass fishing boat, stating that "Following the guilty jury verdict, the defendant John Bolen stipulated on the record to the forfeiture of the vessel." [R120-2] Bolen had not stipulated to the forfeiture, but by implication his counsel did. The Court entered an order forfeiting Bolen's boat on January 5, 2007. [R123]

to both grounds. [R126] The Court denied the motion for new trial without an evidentiary hearing by a summary order without statement of reasons January 23, 2007.[9] [R127]

Bolen filed a supplemental motion for new trial under Rule 33, Federal Rules of Criminal Procedure on February 5, 2007.[10] [R130] The supplemental motion for new trial presented one ground, based on newly discovered evidence, of a *Brady*[11] violation. The *Brady* violation was the withholding by the Government of the criminal record of Garvey. Bolen's counsel recited in his supplemental new trial motion that prior to trial he had traveled to the Bahamas seeking evidence of Garvey's criminal record. He had already made an express *Brady* and *Giglio*[12] demand for the criminal history of both Garvey and Seymore. A law enforcement officer in the Bahamas told counsel for Bolen that Garvey did have a criminal record but would not turn it over voluntarily. Bolen's counsel then contacted the Bahamas Consulate in Miami and was told that the *prosecutor* could get the criminal record information, but that it would not

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[9] This was the Rule 33(a)(2) motion the time for filing of which had been extended from seven to thirty days at the defense request.

[10] This was a Rule 33(a)(1) motion based on newly discovered evidence, which may be filed at any time within three years of the verdict.

[11] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[12] *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

be turned over to the defense. Bolen's counsel alleged that all of this information was told to AUSA Rinku Talwar prior to Bolen's trial, however the Government never turned over any criminal history before Bolen's trial. [R130-1-2]

During trial, Bolen's counsel could not impeach Garvey based on his prior criminal record because defense counsel did not have it to use. Instead, the Government introduced evidence before the jury at trial that Garvey had no criminal record. [R130-2]

Only after the Bolen trial did the Government turn over to counsel for Bolen, by way of a belated response to the standing order of discovery evidence of Garvey's prior criminal record.[13] [R124] The Government stated in its discovery response that it had just received the information it was disclosing one day earlier, January 8, 2007, after the trial had ended. [R124] The Government stated in its discovery response that this information was received from the Bahamian Consulate via fax by I.C.E. Senior Special Agent Wayne Newhouse on January 8, 2007. The Government stated that the information had not been obtained during Bolen's trial despite the due diligence of its agents. No basis for that conclusory claim was set forth in the discovery response. [R124-1]

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[13] This discovery response was filed January 9, 2007 which was within the thirty day window the court had granted Bolen for new trial motions.

The Government took the position in its January 9, 2007 post trial discovery response that the information it was providing did not include certified copies of judgments and sentences with fingerprints, did not include Garvey's date of birth or other more specific identifying information, and that the most recent offense listed was from 1995. Based on that, the Government stated that the information it was disclosing would not have been admissible at Bolen's trial. [R124]

The Government thereafter filed a response to Bolen's supplemental motion for new trial on February 6, 2007. [R131] In its response the Government argued that the supplemental motion for new trial (1) was untimely because not filed within the 30 day extended window for Rule 33(a)(2) motions, and (2) that the Government was unable to secure any documentation of Garvey's criminal record before trial [without specifying what, if anything, it did to secure his record pretrial] and that what it had was not admissible at trial because it was over ten years old.[14] [R131-3-4]

Again, as with the first motion for new trial, on February 7, 2007 the Court summarily denied the supplemental motion for new trial without conducting an evidentiary hearing and without any statement of reasons. [R132]

On February 12, 2007 the Government filed two motions rewarding Seymore

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[14] The Government did not cite, but undoubtedly had in mind Rule 609, Federal Rules of Evidence.

for his testimony against Bolen, a motion for acceptance of responsibility under U.S.S.G. § 3E1.1(b) and a downward departure motion under U.S.S.G. § 5K1.1. [R135, R136] Both motions apparently were granted and Seymore was sentenced March 5, 2007 to the same eighty-four month sentence as Garvey. [R149]

The Court sentenced Bolen the same day as Seymore, March 5, 2007. Bolen's Presentence Investigation Report ("PSR") established that Bolen had no prior criminal record, so pursuant to U.S.S.G., Chapter 5, Part A, he was Criminal History Category I. Bolen was held accountable for 469 kilograms of cocaine for a base offense level 38 under U.S.S.G. § 2D1.1(a)(3). He was given a four level organizer or leader enhancement under U.S.S.G. § 3B1.1(a) and a two level enhancement for use of a special skill (captain of the vessel), under U.S.S.G. § 2D1.1(b)(2)(B), for a total offense level 44, and a guideline range of life.

Relying apparently exclusively on the guidelines to determine sentence, the Court sentenced Bolen to life imprisonment instead of the eighty-four months Garvey and Seymore received for cooperation. [R152] In doing so, despite a lengthy sentencing presentation by the defense, the Court offered virtually no statement in support of the imposition of the life sentence. The Court's entire sentencing statement was as follows:

[THE COURT] The Court has considered the statements of all parties

> the presentence investigation report which contains the advisory guidelines, the statutory factors. Based on the amount of drugs involved, a sentence will be imposed within the guideline range.
>
> It is the finding of the Court that the defendant is not able to pay a fine.
>
> It is the judgment of the Court that the defendant John Bolen will be committed to the Bureau of Prisons to be imprisoned for life. This term consists of life imprisonment on Counts 1 through 4 to be served concurrently. . . .

[R182-37]

STANDARDS OF REVIEW

I. COURT ERRED IN OVERRULING BOLEN'S OBJECTION TO IMPROPER GOVERNMENTAL VOUCHING FOR KEY WITNESS.

The district court's admission of hearsay statements is reviewed for abuse of discretion. See *Mercado v. City of Orlando*, 407 F.3d 1152, 1161 (11th Cir.2005). If an evidentiary ruling is erroneous, "that ruling will result in reversal only if the error was not harmless." *United States v. Hands*, 184 F.3d 1322, 1329 (11th Cir.1999) (citations omitted). "An error is harmless unless there is a reasonable likelihood that [it] affected the defendant's substantial rights." Id. (citation and internal quotations omitted). No reversal will result if "sufficient evidence uninfected by any error supports the verdict," and the error did not have a "substantial influence on the outcome" of the case. Id. (quotations and citations omitted). The Court is required to examine the entire record, comparing the error with "the strength of the evidence of defendant's guilt," to determine "whether an error had substantial influence on the outcome." Id. (quotations and citations omitted). *United States v. Khanani*, 502 F.3d 1281, 1292 (11th Cir. 2007).

II. COURT ERRED IN DENYING BOLEN'S REQUESTED DOWNWARD DEPARTURE JURY INSTRUCTION; and

III. COURT ERRED IN DENYING BOLEN'S REQUESTED THEORY OF DEFENSE JURY INSTRUCTION.

The district court's refusal to deliver a requested jury instruction constitutes reversible error only if the instruction (1) is correct, (2) is not substantially covered by other instructions which were delivered, and (3) deals with some point in the trial so 'vital' that the failure to give the requested instruction seriously impaired the defendant's ability to defend. *United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995).

IV. COURT ERRED IN DENYING (WITHOUT AN EVIDENTIARY HEARING) BOLEN'S SUPPLEMENTAL MOTION FOR NEW TRIAL BASED ON GOVERNMENT'S FAILURE TO PRODUCE CRIMINAL RECORD OF GOVERNMENT WITNESS.

The standard of review of a district court's denial of a motion for a new trial based on a *Brady* violation is abuse of discretion. *United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir.2002).

V. COURT ERRED IN SENTENCING BOLEN WITHOUT ADEQUATELY ADDRESSING THE SECTION 3553 FACTORS AND WITHOUT ADEQUATELY PROVIDING A STATEMENT OF REASONS FOR THE IMPOSITION OF A LIFE SENTENCE ON A FIRST OFFENDER.

In reviewing a post-*Booker* sentence for reasonableness, the Court considers

whether the record as a whole reflects that the district court "adequately and properly considered" the §3553(a) factors, and the defendant's arguments at sentencing. *United States v. Scott*, 426 F.3d 1324, 1329-1330 (11th Cir. 2005). The Court must consider both the §3553(a) factors and the reasons given by the district court. *United States v. Williams*, 435 F.3d 1350, 1354-1355 (11th Cir. 2006).

VI. *DE FACTO* SIXTH AMENDMENT VIOLATION

This issue is presented for preservation only and is foreclosed by current precedent.

SUMMARY OF ARGUMENTS

I. COURT ERRED IN OVERRULING BOLEN'S OBJECTION TO IMPROPER GOVERNMENTAL VOUCHING FOR KEY WITNESS.

Seymore, one of the two key witnesses, without whose testimony Bolen could not have been convicted, was effectively impeached on cross-examination by reference to his plea agreement. In what apparently was a successful effort to rehabilitate Seymore, the Government prosecutor - over objection from Bolen - asked Seymore to tell the jury what she had told him to say. His answer, that she had told him to tell the truth, elicited inadmissible hearsay whose intended purpose was to vouch for the witness's credibility.

II. COURT ERRED IN DENYING BOLEN'S REQUESTED DOWNWARD DEPARTURE JURY INSTRUCTION.

Seymore and Garvey both testified under substantial assistance, cooperation plea agreements which offered them the opportunity to be rewarded for their testimony against Bolen by a Government motion for downward departure. Without a Government substantial assistance motion each faced substantial guideline sentences and multiple ten year minimum mandatory penalties. Bolen proposed a jury instruction that accurately and concisely explained the substantial assistance process to the jury - both the possibility of a downward departure and relief from their mandatory minimum sentences. The instruction was a correct statement of the law, was not covered by any

other jury instruction, and went to the heart of the defense case, which was an attack on the credibility of these two witnesses.

III. COURT ERRED IN DENYING BOLEN'S REQUESTED THEORY OF DEFENSE JURY INSTRUCTION.

Bolen testified and presented evidence that he was a legitimate charter fishing boat owner who employed captains and crews to man his boats which he kept in the Bahamas. Seymore and Garvey, two Bahamians, were caught by the Coast Guard operating Bolen's boat, Gypsy, traveling between the Bahamas and Florida. There was a large amount of cocaine in suitcases onboard Gypsy when it was searched. Bolen was not onboard the vessel, but at his home in Florida when this happened. Bolen gave a statement to the authorities explaining that he had hired Seymore to bring Gypsy over to Florida to repair a damaged prop and in fact Gypsy's prop was damaged and an appointment had been made at a marina to repair the prop. Bolen explained that he had no knowledge that cocaine was being transported on the Gypsy by Seymore and Garvey.

Bolen proposed a theory of defense jury instruction that explained in essence that if the jury found this to be true, then they should find him not guilty. The instruction was a correct statement of the law, was not covered by any other jury instruction, and was Bolen's only defense.

IV. COURT ERRED IN DENYING (WITHOUT AN EVIDENTIARY HEARING) BOLEN'S SUPPLEMENTAL MOTION FOR NEW TRIAL BASED ON GOVERNMENT'S FAILURE TO PRODUCE CRIMINAL RECORD OF GOVERNMENT WITNESS.

Although the Government knew no later than October 20, 2006 that it would use Garvey as a witness at trial against Bolen, it made no effort to obtain his readily available (to the Government) Bahamian criminal record until three days prior to trial, December 4, 2006, when Bolen "demanded" the Government assist him in obtaining the record. The criminal record was readily available to the Government, as demonstrated by the fact that they were able to produce it in just a little over a month's time, even with the intervening Christmas and New Years holidays. But because of the Government's failure to search for the record until it was too late, the criminal record was not produced until after the trial.

The belatedly produced record disclosed *three prior crimes of dishonesty* and one apparent prior felony crime of violence. Although all were outside the ten year window of Rule 609(b), given the materiality of a continuing pattern of crimes of dishonesty, and given that the Government introduced a Bahamian travel document for Garvey that falsely showed he had no prior criminal record, Bolen would have been entitled to cross-examine Garvey on his prior crimes of dishonesty to impeach his credibility.

The Government violated its *Brady* obligation in failing to obtain readily available criminal records. Because the evidence went to the credibility of an essential witness, without whose credibility the jury could not have convicted Bolen, it was reversible error to deny his motion for new trial.

V. COURT ERRED IN SENTENCING BOLEN WITHOUT ADEQUATELY ADDRESSING THE SECTION 3553 FACTORS AND WITHOUT ADEQUATELY PROVIDING A STATEMENT OF REASONS FOR THE IMPOSITION OF A LIFE SENTENCE ON A FIRST OFFENDER.

After a lengthy presentation of sentencing mitigation and a request that the court sentence Bolen to only the ten year minimum mandatory required by statute, the District Court imposed a guideline life sentence, without any discussion whatsoever of the § 3553 factors or its choice of sentence, other than to note the quantity of drugs involved. The court's complete failure to address the § 3553 factors before imposing a life sentence on a first offender who was only the transporter of the drugs involved, coupled with the justification of that sentence by pointing to only one factor, the weight of the drugs, is legally insufficient and requires a *de novo* resentencing. The District Court's sentencing procedure was unsound and the result was unreasonable.

VI. COURT'S APPLICATION OF THE SENTENCING GUIDELINES RESULTED IN A *DE FACTO* VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

This argument is presented solely to preserve the issue for either *en banc* review or subsequent review at the Supreme Court. Counsel recognizes that it appears foreclosed by current precedent.

ARGUMENTS

I. COURT ERRED IN OVERRULING BOLEN'S OBJECTION TO IMPROPER GOVERNMENTAL VOUCHING FOR KEY WITNESS.

On redirect of Government witness Seymore, AUSA Talwar engaged in the following exchange:

BY MS. TALWAR [AUSA]:

Q. Mr. Seymour, what is the one thing and the only thing that I have told you?

A. To tell the truth.

Q. What have I said to you about whether this jury convicted this man or whether they acquit this man? What have I told you?

MR. BROSS: Objection, Judge, hearsay.

THE COURT: Overruled.

BY MS. TALWAR:

Q. Answer the question.

A. You told me it doesn't matter. Just tell the truth. That's all it is, tell the truth.

[R170-212]

Counsel for the Government clearly felt stung by the defense cross-examination

of her key witness and an urgent need to rehabilitate him before the jury. There is a right way and a wrong way to rehabilitate a witness who has been impeached by the terms of a substantial assistance cooperation plea agreement. This is the wrong way.

The error consisted of three things: (1) intentional eliciting of hearsay ("what is the one and only thing I have told you?"), (2) vouching for the witness, and (3) interjection of the Government counsel's own belief in the truthfulness of the witness's testimony.

The exchange constituted hearsay because the question asked the witness to tell the jury what was said by the Government attorney outside of court and not under oath. The hearsay declarant was the Government attorney, who clearly was not subject to cross-examination over what she said either at the time she said it or at the time it was elicited in court. Finally, the only purpose of asking the question and eliciting the answer was to establish the truth of what she said. Rule 801, Federal Rules of Evidence. As hearsay, it was not admissible. Rule 802, Federal Rules of Evidence. The only way this could have been admissible would have been if the credibility of the declarant had been put in issue, but the declarant in this case was the Assistant United States Attorney, and there had been no improper suggestion on cross-examination that she had coached the witness to lie. Rule 806, Federal Rules of Evidence.

The Defense made a timely and specific objection to the hearsay error, but the Court overruled the objection and allowed the answer. Therefore the issue is preserved for appellate review and is subject to harmless error analysis.

> The government argues that, even if the district court erred by admitting Moya's statements . . ., the error was harmless because it presented other evidence to support the . . . conviction. As we have previously made clear, a "non-constitutional error is harmless if, viewing the proceedings in their entirety, a court determines that the error did not affect the verdict, 'or had but very slight effect.' " *United States v. Hornaday*, 392 F.3d 1306, 1315 (11th Cir.2004) (citations omitted) (quoting *Kotteakos v. United States*, 328 U.S. 750, 762, 764, 66 S.Ct. 1239, 1246, 1248, 90 L.Ed. 1557 (1946)). Furthermore, "[i]f one can say 'with fair assurance ... that the judgment was not substantially swayed by the error,' the judgment is due to be affirmed even though there was error." Id. at 1315-16 (quoting *Kotteakos*, 328 U.S. at 764, 66 S.Ct. at 1248).

United States v. Magluta, 418 F.3d 1166, 1180 (11th Cir. 2005).

In evaluating the harm created by this particular hearsay evidence, we ask the Court to consider that its intended effect was to vouch for the credibility of the witness and to insinuate the prosecutor's personal belief about the credibility of her key witness. A prosecutor's vouching for the credibility of witnesses and expressing her personal opinion concerning the guilt of the accused is impermissible. "The prohibition against vouching does not forbid prosecutors from arguing credibility . . . it forbids arguing credibility based on the reputation of the government office or on evidence not before the jury." *United States v. Hernandez*, 921 F.2d 1569, 1573 (11th Cir.1991).

> When faced with a question of whether improper vouching occurred we ask: "whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness's credibility." *United States v. Sims*, 719 F.2d 375, 377 (11th Cir.1983), cert. denied, 465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984). In applying this test, we look for whether (1) the prosecutor placed the prestige of the government behind the witness by making explicit assurances of the witness's credibility, or (2) the prosecutor implicitly vouched for the witness's credibility by implying that evidence not formally presented to the jury supports the witness's testimony. *Sims*, 719 F.2d at 377.

United States v. Castro, 89 F.3d 1443, 1457 (11th Cir. 1996).

This was not a situation where the Government merely questioned Seymore about the requirements of the plea agreement to testify fully and truthfully. That would have been permissible. Nor did the prosecutor merely point out that Seymore risked prosecution if he perjured himself. This Court has found that type of rehabilitation in the context of a Government witness testifying under a plea agreement to be proper. See *Sims*, 719 F.2d at 377. However, the prosecutor in Bolen's case went outside the permissible bounds of rehabilitation and directly insinuated her personal belief that the witness was truthful and that he was truthful because she told him to be. The obvious and intended implication was that if she did not think he was being truthful, she would not be asking this question nor presenting his testimony. This wholly improper form of rehabilitation had no place in this trial.

The Government's entire case rested on Seymore and Garvey's credibility. Their credibility was dependent on their mutual corroboration. The Government resorted to a desperate measure to restore that credibility because credibility was severely in doubt. The Government cannot meet its burden of showing that this error was harmless beyond a reasonable doubt.

II. COURT ERRED IN DENYING BOLEN'S REQUESTED DOWNWARD DEPARTURE JURY INSTRUCTION.

Bolen filed proposed defense jury instructions before trial in accordance with Rule 30, Federal Rules of Criminal Procedure. [R102] Included in the proposed defense requested jury instructions was a jury instruction explaining the availability of a downward departure for the two cooperating alleged coconspirators, Garvey and Seymore. [R102-27; Defendant's Proposed Jury Instruction No. 15] The instruction read:

Motions for Downward Departure

> You have heard evidence in this case from two witnesses who were also originally defendants in this case. In exchange for their testimony here against Mr. Bolen, as part of their plea agreement the Government may file a motion for downward departure or a motion for sentence reduction. In federal court, the judge, guided by the federal sentencing guidelines determines the range of imprisonment within which the judge may sentence the defendant absent extraordinary circumstances. The guidelines also contain a provision whereby the United States can make a motion for downward departure if the defendant has provided substantial assistance in the investigation or prosecution of another

> individual. If and only if the prosecutor files such a motion is the Court empowered to depart below the statutory minimum sentences the cooperating defendants face. It is the ultimate decision of the judge presiding over the case to make the determination whether to depart below the otherwise applicable sentencing range and how much to depart. However, without a motion from the Government, a higher sentence is guaranteed. Here, two witnesses who have testified against Mr. Bolen have entered into such a plea agreement with the Government whereby in exchange for their testimony, they may receive a significantly lighter sentence.

[R102-27; Defendant's Proposed Jury Instruction No. 15]

The Court denied the requested "downward departure" jury instruction. [R173-589; R173-587]

A refusal to give a requested theory of defense instruction is reversible error if the requested instruction (1) was correct, (2) was not substantially covered by the court's charge to the jury, and (3) dealt with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense. *United States v. Cunningham*, 194 F.3d 1186, 1200 (11th Cir. 1999), citing *United States v. Morris*, 20 F.3d 1111, 1115-16 (11th Cir. 1994).

The requested jury instruction was a correct statement of the law. Federal judges are guided in sentencing by the United States Sentencing Guidelines. 28 U.S.C. § 991, *et seq*. The guidelines provide a mechanism for the Government to file a motion for downward departure or reduction in sentence based on substantial

assistance in the prosecution of others. U.S.S.G. § 5K1.1. *See also*, Rule 35, Federal Rules of Criminal Procedure. The court cannot depart below a minimum mandatory sentence (and both witnesses, Garvey and Seymore were facing minimum mandatory sentences), without such a motion from the Government. 18 U.S.C. § 3553(e). This Court has repeatedly held that the district court is without power to depart downward below a statutory minimum mandatory absent a government motion:

> To the extent that Alamin seeks a judicial determination of substantial assistance in order to authorize a downward departure from the guidelines on resentencing, Alamin ignores the plain language of section 3553(e) and Sentencing Guidelines § 5K1.1. Section 3553(e) states that, "[*u]pon motion of the Government*, the Court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the . . . prosecution of another person." (Emphasis added.) Sentencing Guidelines § 5K1.1 similarly provides that, " [*u]pon motion of the government* stating that the defendant has made a good faith effort to provide substantial assistance . . ., the court may depart from the guidelines." (Emphasis added.) As these provisions make clear, without a motion by the Government requesting a departure, the district court may not depart from the guidelines on the ground of substantial assistance. See *United States v. Huerta*, 878 F.2d 89, 91 (2d Cir.1989), cert. denied , 493 U.S. 1046, 110 S.Ct. 845, 107 L.Ed.2d 839 (1990).

United States v. Alamin, 895 F.2d 1335, 1337 (11th Cir. 1990).

The Court gave no alternative instruction to explain to the jury the unique power the Government had to reward its witnesses for their testimony against Bolen.

Finally, the requested instruction dealt with a point in the trial so important that

failure to give the requested instruction seriously impaired Bolen's ability to conduct his defense. As we have repeatedly argued in this appeal, the Government's case hinged on the testimony of these two cooperating witnesses, Garvey and Seymore, who were testifying under substantial assistance plea agreements. Their credibility was the *sin qua non* of the burden of proof. Something as important as the unique power of the Government to unlock the door to a minimum mandatory drug sentence should be explained to a jury. The Court knew it was a correct statement of the law; Garvey and Seymore for sure knew it was a correct statement of the law; the lawyers for both sides knew it was true: only the jury was left to speculate.

In fact, the Government did subsequently reward both Garvey and Seymore with the downward departure motions anticipated in the requested jury instruction resulting in sentences substantially below the statutory minimum mandatory and well below what their guidelines called for. If the Court is going to accept the proposition that the Government can reward witness testimony with substantial assistance motions, then at a minimum the jury should have the law explained to them. *Cf. United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) (18 U.S.C. § 201(c)(2) prohibits rewarding government witness for his testimony by filing substantial assistance motion), rehearing *en banc*, *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (*en banc*).

III. COURT ERRED IN DENYING BOLEN'S REQUESTED THEORY OF DEFENSE JURY INSTRUCTION.

A criminal defendant has the right to have the jury instructed on his theory of defense, separate and apart from instructions given on the elements of the charged offense. *United States v. Opdahl*, 930 F.2d 1530 (11th Cir.1991); *United States v. Lively*, 803 F.2d 1124 (11th Cir.1986). A trial court may not refuse to charge the jury on a specific defense theory where the proposed instruction presents a valid defense and where there has been some evidence adduced at trial relevant to that defense. *United States v. Middleton*, 690 F.2d 820, 826 (11th Cir.1982), cert. denied, 460 U.S. 1051, 103 S.Ct. 1497, 75 L.Ed.2d 929 (1983). The trial court is not free to determine the existence of such a defense as a matter of law. Id. The threshold burden is extremely low: "[T]he defendant . . . is entitled to have presented instructions relating to a theory of defense for which there is *any foundation* in the evidence." *Perez v. United States*, 297 F.2d 12, 15-16 (5th Cir.1961) (emphasis added). In deciding whether a defendant has met his burden, the court is obliged to view the evidence in the light most favorable to the accused. *United States v. Williams*, 728 F.2d 1402, 1404 (11th Cir.1984).

A refusal to give a requested theory of defense instruction is reversible error if the requested instruction (1) was correct, (2) was not substantially covered by the

court's charge to the jury, and (3) dealt with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense. *United States v. Cunningham*, 194 F.3d 1186, 1200 (11th Cir. 1999).

In accordance with Rule 30, Federal Rules of Criminal Procedure, Bolen proposed in writing pretrial a requested theory of defense instruction which read as follows:

> The defendant has put forth a theory of defense in this case. The theory of defense is that he was performing a lawful business activity in that he was running a fishing boat charter business, he was having his boat brought to the United States for repair and had no knowledge of any illegal activity or controlled substance on his boat when he hired persons to bring his boat to the United States. If you conclude this to be what occurred, you must find the defendant not guilty.

[R102-17]

The Court denied the requested instruction [R173-589; R173-587], and instead instructed the jury as follows:

> It is the defendant's theory of defense in this case that he lacked the requisite mental state to commit any of the offenses charged in the indictment. If you find the defendant lacked the requisite mental state as to any of the offenses charged in the indictment, then you should of course find the defendant no guilty as to that count.

[R173-611]

A defendant is entitled to have presented instructions relating to a theory of

defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. *United States v. Lively*, 803 F. 2d 1124, 1125-1126 (11th Cir. 1986). There was no dispute that Bolen through his own testimony presented evidence to factually support his requested jury instruction.

Bolen's requested instruction meets all three requirements of *Cunningham*, *supra*, First, the requested jury instruction correctly stated the law: where the defendant had put forth that he was running a legitimate charter fishing business; a repair was scheduled and that repair was the purpose of the trip to Florida, and if the jury concluded that this was what occurred they must find the defendant not guilty. Substantively, this instruction covered the defendant's legitimate business and his purpose for having the boat transported and his lack of knowledge of the drugs aboard his boat. A requirement of all counts for which the defendant was charged was that he was a knowing participant in any and all transactions or occurrences with which he was charged. If the defendant had no knowledge of the criminal use of his boat that Garvey and Seymore made of it, then he could not be found guilty of the charges against him. This was a correct legal conclusion as it was submitted to the court.

Second, the actual charge to the jury did not substantially cover the proposed instruction. The Court's alternative theory of defense instruction given to the jury did

not explain what was meant by "lacked the requisite mental state" and did not place the lack of mental state into the context of the defense presented. The instruction proposed by the defendant gave the jury a clear and concise explanation of what was presented to them through testimony. The requisite mental state was explained not in definition form, but by stating that if they believed what the defendant presented, then he had no knowledge of the illegal activities, and if he had no knowledge, the requisite mental state was not present and he must be found not guilty.

Finally, the refusal to give the requested theory of defense jury instruction substantially impaired the defendant's ability to prepare an effective defense. The entire basis of the theory of defense was that the defendant had no knowledge of the illegal activities occurring aboard his boat. Without the requested jury instruction, the jury may not have known that if they believed that the defendant was running a legitimate business and had no knowledge then they had to find him not guilty. The requested jury instruction was the entire basis of the defendant's theory of defense that although the drugs were found on the boat he owned and which was operated by his crew, so long as he had no knowledge that they were on board, he must be found not guilty.

The jury instruction requested by the defendant was legally correct, was not substantially covered by the instruction submitted to the jury and substantially impaired

the defendant's ability to prepare an effective defense.

IV. COURT ERRED IN DENYING (WITHOUT AN EVIDENTIARY HEARING) BOLEN'S SUPPLEMENTAL MOTION FOR NEW TRIAL BASED ON GOVERNMENT'S FAILURE TO PRODUCE CRIMINAL RECORD OF GOVERNMENT WITNESS.

Bolen filed a supplemental motion for new trial under Rule 33, Federal Rules of Criminal Procedure on February 5, 2007.[15] [R130] The supplemental motion for new trial presented one ground, based on newly discovered evidence, of a *Brady* violation. The *Brady* violation was the withholding by the Government of the criminal record of Garvey. Bolen's counsel recited in his supplemental new trial motion that prior to trial he had traveled to the Bahamas seeking evidence of Garvey's criminal record. He had already made an express *Brady* and *Giglio* demand for the criminal history of both Garvey and Seymore. A law enforcement officer in the Bahamas told counsel for Bolen that Garvey did have a criminal record but would not turn it over voluntarily. Bolen's counsel then contacted the Bahamas Consulate in Miami and was told that the *prosecutor* could get the criminal record information, but that it would not be turned over to the defense. Bolen's counsel alleged that all of this information was told to AUSA Rinku Talwar prior to Bolen's trial, however the Government never turned over

[15] This was a Rule 33(a)(1) motion based on newly discovered evidence, which may be filed at any time within three years of the verdict. The Government's argument below that the motion was untimely because not filed within the thirty day extension the lower court granted for Bolen to file his Rule 33(a)(2) motions is without merit.

any criminal history before Bolen's trial. [R130-1-2]

During trial, Bolen's counsel could not impeach Garvey based on his prior criminal record because defense counsel did not have it to use. Instead, the Government introduced evidence before the jury at trial that Garvey had no criminal record. [R130-2]

Only after the Bolen trial did the Government turn over to counsel for Bolen, by way of a belated response to the standing order of discovery evidence of Garvey's prior criminal record.[16] [R124] The Government stated in its discovery response that it had just received the information it was disclosing one day earlier, January 8, 2007, after the trial had ended. [R124] The Government stated in its discovery response that this information was received from the Bahamian Consulate via fax by I.C.E. Senior Special Agent Wayne Newhouse on January 8, 2007. The Government stated that the information had not been obtained during Bolen's trial despite the due diligence of its agents. No basis for that conclusory claim was set forth in the discovery response. [R124-1]

The Government filed a response to Bolen's supplemental motion for new trial on February 6, 2007. [R131] In its response the Government argued that the

[16] This discovery response was filed January 9, 2007 which was within the thirty day window the court had granted Bolen for new trial motions.

supplemental motion for new trial (1) was untimely because not filed within the 30 day extended window for Rule 33(a)(2) motions, and (2) that the Government was unable to secure any documentation of Garvey's criminal record before trial [without specifying what, if anything, it did to secure his record pretrial] and that what it had was not admissible at trial because it was over ten years old.[17] [R131-3-4]

Interestingly the Government attorney represented that she had "no information [pretrial until she was advised by Bolen's counsel] indicating that Mr. Garvey had any criminal history." [R131-2] This strongly suggests that Garvey had lied to the Government about his lack of prior criminal record, because he would, of necessity, been asked by the Government whether he had any prior record before the Government called him as a witness and before the Government would have agreed to use him for substantial assistance.

Again, as with the first motion for new trial, on February 7, 2007 the Court summarily denied the supplemental motion for new trial without conducting an evidentiary hearing and without any statement of reasons. [R132]

Rule 609(b) of the Federal Rules of Evidence prohibits the admission of evidence of past convictions for impeachment purposes if the convictions are more

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[17] The Government did not cite, but undoubtedly relied upon Rule 609, Federal Rules of Evidence.

than ten years old, "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." In *United States v. Sloman*, 909 F.2d 176, 181 (6th Cir. 1990), cited with approval by *United States v. Pritchard*, 973 F.2d 905, 908-909 (11th Cir. 1992), the Sixth Circuit listed several relevant factors to be considered when deciding whether to admit evidence pursuant to Rule 609(b):

1. The impeachment value of the prior crime;

2. The point in time of the conviction and the witness' subsequent history;

3. The similarity between the past crime and the charged crime;

4. The importance of the defendant's testimony;

5. The centrality of the credibility issue.

Garvey's record established that he had three prior convictions for crimes of dishonesty and what appeared to be one prior conviction for a violent felony. [R124] Certainly had this record been presented to the lower court, the Court could, in its discretion, have allowed Bolen to cross-examine Garvey on it. The impeachment value was great. Unlike a simple felony conviction, which may have little value beyond proof of bad character generally but have little impact on credibility, *per se*, a conviction for a crime of dishonesty goes right to the point in question, the credibility and

truthfulness of the witness.

This Court has held that a trial court has no discretion to refuse to permit impeachment of a witness based on a conviction for a crime of dishonesty, when that crime is within the ten year window:

> It is established that mail fraud is a crime involving "dishonesty or false statement." *United States v. Cohen*, 544 F.2d 781, 785 (5th Cir.), cert. denied, 431 U.S. 914, 97 S.Ct. 2175, 53 L.Ed.2d 224 (1977); accord, *United States v. Brashier*, 548 F.2d 1315, 1326-27 (9th Cir. 1976), cert. denied, 429 U.S. 1111, 97 S.Ct. 1149, 51 L.Ed.2d 565 (1977). Subsection (a)(2) rather than (a)(1) of rule 609 therefore applies in determining the admissibility of a mail fraud conviction for impeachment. Rule 609(a)(2) contains no provision for excluding evidence of a *crimen falsi* on the ground of undue prejudice; that ground can serve as a basis for excluding such evidence only if rule 403, with its prejudice versus probative value weighing provision, is applicable. Rule 609(a)(2) provides that evidence of a prior criminal conviction for a crimen falsi offense shall be admitted to attack a witness's credibility during cross-examination. When discussing rule 609(a)(2) Congress made this clear:
>
> > The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.
>
> H.R.Conf.Rep.No.93-1597, 93d Cong., 2d Sess. 9, reprinted in (1974) U.S. Code Cong. & Admin.News, pp. 7098, 7103 (emphasis added). A number of courts have adhered to this congressional intent, observing that a court has no discretion to exclude evidence of a prior *crimen falsi* conviction. See, e. g., *United States v. Fearwell*, 193 U.S.App.D.C. 386, 392, 595 F.2d 771, 777 (D.C.Cir.1979); *United States v. Hawley*,

554 F.2d 50, 52 (2d Cir. 1977).

United States v. Toney, 615 F.2d 277, 279 (5th Cir. 1980).

Garvey had not one, but three prior convictions for crimes of dishonesty. This militates against considering the convictions stale. This is evidence of a persistent and continuing pattern of dishonesty.

Garvey was the single most important witness, because Garvey both corroborated the testimony of the other cooperating coconspirator and was the only witness as to the expanded scope of the conspiracy beyond the two July 2006 incidents. Garvey was a key witness and his credibility was essential to the Government's case, because without Garvey to corroborate Seymore, there would have been no evidence to support the conviction. This case came down to Garvey and Seymore and their mutual corroboration. Under the Eleventh Circuit's standard, Bolen would have been permitted to cross-examine Garvey on his prior criminal record, and if that is, so, then he should be entitled to a new trial to do so.

In *United States v. Cohen*, 544 F.2d 781, 784-786 (5th Cir. 1977) this Court upheld impeachment for a crime of dishonesty outside the ten year window of Rule 609(b), explaining:

> In *United States v. San Martin*, 505 F.2d 918, 923 (5th Cir. 1974), this Court observed that "prior crimes involving deliberate and carefully premeditated intent such as fraud and forgery are far more likely to have

> probative value with respect to later acts than prior crimes involving a quickly and spontaneously formed intent." Similarly such crimes are more probative on the issue of propensity to lie under oath than more violent crimes which do not involve dishonesty.

If there were doubt about its admissibility, that doubt would have to be resolved against the Government, given the Government's back door suggestion that Garvey had no prior criminal record. The Government introduced through the Coast Guard officer Government Exhibit 10, Garvey's purported Bahamian travel document, which contained the statement that Garvey had no prior criminal record. Having chosen to do this, the Court would have had to permit Bolen the opportunity to cross Garvey on this document. Either Garvey would have had to admit that he had falsified the travel document or admit his prior criminal record or both.

"Cross-examination of a government 'star' witness is important, and a presumption favors free cross-examination on possible bias, motive, ability to perceive and remember, and general character for truthfulness." *United States v. Phelps*, 733 F.2d 1464, 1472 (11th Cir.1984). Whether it were a violation of the Government's obligation under *Brady*/*Giglio*[18] or not, Bolen is entitled to a new trial based on this new evidence *qua* new evidence.

However, Bolen's facts present a case for relief under *Brady*/*Giglio*. The

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[18] *Brady* generally refers to exculpatory evidence, *Giglio* to impeachment evidence. *United States v. Jordan*, 316 F.3d 1215, 1256 (11th Cir. 2003).

supplemental motion for new trial cited *Brady* and *Giglio* to the lower court. The Government's responsibility under *Brady*/*Giglio* is well settled:

> The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). As the Supreme Court later clarified, there are three components of a true *Brady* violation: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999). Evidence is material so as to establish prejudice only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985).

Kelley v. Secretary for Dept. of Corrections, 377 F.3d 1317, 1354 (11th Cir. 2004).

Bolen's case is closely parallel to *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980). In *Auten* the Government decided to offer immunity to a co-conspirator named Taylor the night before Auten's trial. Because of the short time between the decision to use Taylor as a witness and the start of the trial, the Government had not done an NCIC criminal record check on Taylor. Taylor testified that he had only one prior felony conviction. After trial it was disclosed that Taylor may have had two other qualifying criminal convictions. The Government defended against Auten's *Brady*

claim arguing that *Brady* applies only to evidence in the possession of the Government.

On these facts the Court rejected the Government's argument, finding that the evidence was *available*, and the decision of the prosecutor to not seek it out, even on short notice, was no defense. The Court did not find that the prosecutor acted in bad faith, because prosecutorial bad faith is not a condition to a *Brady* claim, simply that the evidence would have been available had the prosecution chosen to inquire.

> The prosecution challenges the first element, insisting that it could not withhold or suppress evidence unknown to it. That the prosecutor, because of the shortness of time, chose not to run an FBI or NCIC check on the witness, does not change "known" information into "unknown" information within the context of the disclosure requirements. As we observed in our *en banc* decision in *Calley v. Callaway*, 519 F.2d 184, 223 (5th Cir. 1975):
>
> > The basic import of *Brady* is ... that there is an obligation on the part of the prosecution to produce certain evidence actually or constructively in its possession or accessible to it in the interests of inherent fairness.
>
> And again at 224:The leading articles on enhanced criminal discovery emphasize what we stress here, that *Brady* and other means of criminal discovery indicate the need for disclosure of important information known or available to the prosecutor in order to promote the fair administration of justice.
>
> The need referred to in *Calley* is premised on the fact that the prosecutor has ready access to a veritable storehouse of relevant facts and, within the ambit of constitutional, statutory and jurisprudential directives, this access must be shared "in the interests of inherent fairness ... to promote

> the fair administration of justice."See also *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966). If disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government. This we decline to do.

United States v. Auten, 632 F.2d 478, 481 (5th Cir. 1980).

Auten is on all fours with Bolen. In Bolen's case the Government knew by October 20, 2006, if not sooner, that it intended to use Garvey as a witness in Bolen's trial. [R72; order referring case to Magistrate Judge for Garvey's change of plea] Therefore by that date, if not sooner, the Government had a duty to seek out the available criminal record history on its intended witness. Garvey was known to be a Bahamian citizen and the Government was already pursuing its investigation of the case in the Bahamas. The Government simply chose to not seek Garvey's available criminal record. The Government stated in its response to Bolen's supplemental motion for new trial that it only sought out Garvey's available Bahamian criminal record on December 4, 2006, three days before trial, and then only when defense counsel "demanded the undersigned's assistance in securing [Garvey's criminal record]." [R131-2] Once the Government inquired of the Bahamian authorities, it was able to obtain Garvey's record by January 8, 2007, and this with the intervening Christmas and New Years holidays. Had the Government sought the record in a

timely manner, it would have had it before trial and Bolen would have been able to use it to impeach Garvey. Thus, under *Auten*, Bolen is entitled to a new trial under traditional *Brady*/*Giglio* analysis.[19]

Alternatively, if the Court is of the opinion that the existing record is insufficient to decide whether there has been a *Brady*/*Giglio* violation or not, then Bolen asks that the matter be remanded to the District Court for an evidentiary hearing. Indeed, it is Bolen's position that the District Court erred in denying the motion without an evidentiary hearing.

At an evidentiary hearing the District Court could determine what role the Bahamian authorities were playing in the investigation of the broader conspiracy of which Bolen was just a transporter; whether the Bahamian authorities notified the DEA or other federal authorities in Bolen's case when Bolen's counsel traveled to the

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[19] *See also*, *Martinez v. Wainwright*, 621 F.2d 184, 188 (5th Cir. 1980) ("Our conclusion that the prosecutor may be deemed to have been in possession of the rap sheet, by virtue of its retention by the medical examiner while the prosecutor assured all that no such document existed, effectuates the purpose of *Brady* and *Agurs*. A contrary holding would enable the prosecutor "to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial," *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977)") and *United States v. Perdomo*, 929 F.2d 967, 970 (3rd Cir. 1991) ("We agree with the appellant that the prosecution's failure to conduct a search of local Virgin Islands records to verify Soto's criminal background meets the first element of a valid *Brady* complaint. It is well accepted that a prosecutor's lack of knowledge does not render information unknown for *Brady* purposes.").

Bahamas and inquired of the authorities about Garvey's record; what communications had taken place, and when, between the federal authorities in Bolen's case and the Bahamian authorities; what databases were available to the DEA to research Bahamian criminal records, etc.

The Government itself presented evidence at Bolen's trial that it had already expanded its investigation into Bolen's supposed Bahamian source in the Bahamas, Danny Bullard and expressly referred to "our officers" (apparently referring to DEA in the Bahamas) as having investigated Bullard. [*See e.g.* R172-385]

On this record the District Court should have conducted an evidentiary hearing to determine whether there was a basis for a new trial under *Brady* or not if it was not inclined to summarily grant relief.[20] Although we argue that Bolen was entitled to relief based on the record that was already before the District Court, in any event it was error for the district court to deny the motion for new trial without conducting an evidentiary hearing to make further fact findings. *United States v. Culliver*, 17 F.3d 349 (11th Cir. 1994), *United States v. Gates*, 10 F.3d 765 (11th Cir. 1993), *United*

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[20] *See United States v. Avellino*, 136 F.3d 249, 255-256 (2nd Cir. 1998) (suggesting that remand for evidentiary development would have been appropriate when the record was unclear what the knowledge and role was of various participants in agencies which otherwise would not have been subject to the *Brady* rule's imputation of knowledge which is generally limited to members of the prosecution team.)

States v. Fernandez, 136 F.3d 1434 (11th Cir. 1998).

V. COURT ERRED IN SENTENCING BOLEN WITHOUT ADEQUATELY ADDRESSING THE SECTION 3553 FACTORS AND WITHOUT ADEQUATELY PROVIDING A STATEMENT OF REASONS FOR THE IMPOSITION OF A LIFE SENTENCE ON A FIRST OFFENDER.

While this Court has instructed that a district court, post-*Booker*, must "calculate correctly the sentencing range prescribed by the Guidelines," *United States v. Crawford*, 407 F.3d 1174, 1178-1179 (11th Cir. 2005), including any and all departures permissible under the Guidelines, *United States v. Jordi*, 418 F.3d 1212, 1215 (11th Cir. 2005), as a first step in the multi-factor analysis now mandated under 18 U.S.C. § 3553(a), it violates *Booker* and the Sixth Amendment for a sentencing court either to presume the thus-calculated Guideline sentence to be a "reasonable sentence," or to justify imposition of the Guideline sentence in terms of "reasonableness," as the district court apparently did here.

"Reasonableness" of the sentence imposed is a determination to be made only by an appellate court based upon whether the record as a whole reflects that the district court "adequately and properly considered" the §3553(a) factors (including, but certainly not limited to the Guidelines), as well as the defendant's arguments with regard to those factors at sentencing. *United States v. Scott*, 426 F.3d 1324, 1329-1330 (11th Cir. 2005). Here, the record does not reflect that the court

considered at all, let alone "adequately and properly," "the nature and circumstances of the offense," §3553(a)(1); the "history and characteristics of the defendant," §3553(a)(1); the need for the sentence imposed "to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct," §3553(a)(6); whether the sentence imposed was "sufficient but not greater than necessary, to comply with this and other purposes of sentencing, §3553(a), or Bolen's arguments with respect to these factors.

Notably, Bolen argued for the minimum mandatory sentence of ten years, pursuant to the analysis in §3553(a), based on Bolen's lack of any prior criminal record, his strong community and family support, his prior employment, and similar factors. The District Court did not address any of the § 3553 factors or Bolen's sentencing mitigation arguments. The court completely failed to address any of the § 3553 factors before imposing a life sentence on this young first offender.

The same day the District Court sentenced Bolen to life imprisonment, it sentenced Garvey and Seymore to just eight years imprisonment. Even given the "cooperation" of Garvey and Seymore, this suggests an unwarranted disparity. There is no indication from the record that the district court ever considered this disparity. *See* 18 U.S.C. §3553(a)(6).

While this Court has held that the district court need not explicitly discuss each

of the §3553(a) factors in imposing sentence so long as the record reflects that the district court "adequately and properly considered" the factors, *Scott*, 426 F.3d at 1329-1330, in evaluating whether a given sentence is unreasonable, this Court must consider both the §3553(a) factors, and the reasons given by the district court. *United States v. Williams*, 435 F.3d 1350, 1354-1355 (11th Cir. 2006). The Court has held, in this regard, that a "district court's 'unjustified reliance upon any one [§3553(a)] factor is a symptom of an unreasonable sentence." *United States v. Crisp*, 454 F.3d 1285, 1292 (11th Cir. 2006). Here, the only factor the District Court noted in choosing a life sentence was drug quantity - - in a case in which even the Government agreed that Bolen was just a water born mule. By placing unjustified reliance upon one §3553(a) factor, drug quantity and the applicable Guideline range, 18 U.S.C. §3553(a)(4)(A), without considering the many reasons why that Guideline range was an unreasonable range, and a life sentence much "greater than necessary" to achieve the purposes of sentencing, the Court imposed an unreasonable sentence.

Bolen requests this honorable Court vacate the judgment and sentence in his case, and remand for a *de novo* resentencing.

VI. COURT'S APPLICATION OF THE SENTENCING GUIDELINES RESULTED IN A *DE FACTO* VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

This argument is presented solely to preserve the issue for either *en banc* review

or subsequent review at the Supreme Court. Counsel recognizes that it appears foreclosed by current precedent.

The *Booker*[21] remedy as applied by the federal courts has resulted in a *de facto* violation of the Fifth and Sixth Amendments, because the lower federal courts have in practical effect continued to apply the Guidelines in a mandatory fashion. *Booker's* remedy for the Sixth Amendment violation caused by judicial fact-finding of facts essential to the determination of the sentence, was to excise 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory and replace it with the instruction that the Guidelines, henceforth, would be advisory only.

However, as Justice Scalia predicted,[22] the result has been anything but advisory Guidelines. Instead what has developed in practical application are *de facto* mandatory Guidelines. *See* U. S. Sentencing Commission, Final Report on the Impact of *United States v. Booker* on Federal Sentencing, (March 2006), found at http://www.ussc.gov/booker_report/Booker_Report.pdf.

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[21] *United States v. Booker*, 543 U.S. 220 (2005).

[22] "Will appellate review for "unreasonableness" preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges? Will it simply add another layer of unfettered judicial discretion to the sentencing process? Or will it be a mere formality, used by busy appellate judges only to ensure that busy district judges say all the right things when they explain how they have exercised their newly restored discretion?" *Booker*, 543 U.S. at 313.

When the practical application of a statute results in a constitutional violation, the court is required to fashion a remedy which prevents the constitutional harm. Whatever the standard of scrutiny applicable to a Sixth Amendment violation, whether strict scrutiny (which we suggest is the appropriate standard), intermediate scrutiny or otherwise, the result of the *Booker* remedy provision has been to *de facto* incorporate mandatory Guidelines back into the sentencing process. The evidence from the Sentencing Commission is not subject to any other reasonable interpretation, and enough cases have been analyzed at this point (over 76,000 post-*Booker* sentencings were studied) to enable us to state with confidence that this has been the effect, intended or not. This has been no remedy - - this has been a new wrong.

This Court is familiar with its equitable power to fashion a remedy for governmental action which results in *de facto* constitutional harms. The remedy is clear - - until Congress acts to rewrite the sentencing statutes to provide a constitutionally permissible sentencing regime, This Defendant, and others similarly situated, is entitled to resentencing utilizing procedures that *insure* that his Fifth and Sixth Amendment rights will be safeguarded. *Booker* has notably failed to achieve that requirement.

A proper remedy is not difficult and is easily implemented. This Defendant's case should be remanded with instructions that he be resentenced under the applicable

Guidelines without, however, the application of any guideline enhancement that was not charged in the indictment and found by a jury beyond a reasonable doubt. This simple mechanism would insure the protection of the Defendant's constitutionally guaranteed liberty as no other remedy has or could.

CONCLUSION

Appellant John Thomas Bolen respectfully requests this honorable Court vacate his judgment and sentence and remand the case to the District Court for a new trial, or in the alternative that the case be remanded for an evidentiary hearing on the supplemental motion for new trial, or resentencing consistent with the arguments presented herein.

If this Court is of the view that no single error standing alone is sufficient to require reversal, then Bolen submits that the cumulative effect of the errors at trial, the improper admission of hearsay which constituted vouching for the key Government witness's credibility, the denial of the defense requested jury instruction on the availability of a downward departure for the two Government witnesses upon whose credibility the case depended, the denial of a proper theory of defense jury instruction, and the denial of the supplemental motion for new trial based on the failure to timely

produce the criminal record of the key Government witness, requires reversal and a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains approximately 13,892 words. Under Rule 32(a) the brief is permitted to have 14,000 words.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certifies that the size and style of type used in this brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to Anne R. Schultz, Esquire, Assistant United States Attorney, Office of the United States Attorney, 99 N.E. 4th Street, Suite 512, Miami, Florida 33132-2131, by United States Postal Service, first class mail, postage prepaid, this 21st day of February, 2008.

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William Mallory Kent